

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

FILED BY CLERK

OCT -9 2008

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

ANTHONY CAMPBELL,)	
)	2 CA-CV 2008-0081
Plaintiff/Appellant,)	DEPARTMENT B
)	
v.)	<u>MEMORANDUM DECISION</u>
)	Not for Publication
J&T DESERT PROPERTIES, LLC, an)	Rule 28, Rules of Civil
Arizona limited liability company;)	Appellate Procedure
JOHN H. WRIGHT AND COMPANY,)	
INC., an Arizona corporation; J.D.)	
WRIGHT; and JOHN H. WRIGHT,)	
)	
Defendants/Appellees.)	
)	

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. CV-200701084

Honorable William J. O'Neil, Judge

AFFIRMED

Anthony Campbell

Yakima, Washington
In Propria Persona

Holloway Odegard Forrest & Kelly, P.C.
By Peter C. Kelly, II, Larry J. Wulkan,
and Rae Richardson

Phoenix
Attorneys for Defendants/Appellees

E S P I N O S A, Judge.

¶1 Anthony Campbell appeals from the trial court’s denial of his motion for relief from judgment or, alternatively, for an order permitting him to bring a new action for the same cause after it dismissed his lawsuit for failure to prosecute. We affirm.

Facts and Procedural History

¶2 In December 2006, Campbell sued J&T Properties, LLC; John H. Wright and Company, Inc.; J.D. Wright; and John H. Wright (collectively, “J&T”) in Maricopa County for “physical” and economic damages resulting from negligent construction of a house. Campbell mailed J&T’s counsel a form for waiving formal service of process, but J&T did not return the form. In March 2007, the Maricopa County Superior Court issued a notice of intent to dismiss the case pursuant to Rule 4(i), Ariz. R. Civ. P., if Campbell had not achieved service by April 2, 2007. In late March, Campbell moved to extend time for service pending transfer of the case to Pinal County. The court granted this motion, extending the time for service until May 2007, but cautioned Campbell that “delays for settlement negotiations” did not constitute good cause to continue the case on the inactive calendar and that Rule 38.1, Ariz. R. Civ. P., would strictly apply. J&T stipulated to the change of venue, and the case was transferred to Pinal County.

¶3 When Campbell thereafter still did not effect service of process, the case was placed on the inactive calendar and scheduled for dismissal in November 2007. Before the scheduled dismissal date, Campbell filed a motion to extend the case on the inactive

calendar. The court granted the motion, extending time until February 2008. Before the February deadline, Campbell again moved to extend the time for service, this time on grounds exhibits had been lost, communication between Campbell and his attorney was hampered by distance, and settlement negotiations were time-consuming. The court scheduled a hearing on Campbell's motion, but neither he nor his attorney appeared for the hearing, and the court denied the motion. Campbell thereafter filed a motion for relief from judgment or, alternatively for an order permitting commencement of a new action for the same cause pursuant to Rule 60(c), Ariz. R. Civ. P., and A.R.S. § 12-504(A). The trial court's denial of that motion gave rise to this appeal.

Discussion

¶4 We will not disturb a trial court's order dismissing an action for failure to prosecute except for an abuse of discretion. *Cooper v. Odom*, 6 Ariz. App. 466, 469, 433 P.2d 646, 649 (1967). "An 'abuse of discretion' is discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *Quigley v. City Court*, 132 Ariz. 35, 37, 643 P.2d 738, 740 (App. 1982).

¶5 Campbell argues the trial court erred in dismissing his case for failure to prosecute because, by stipulating to a change of venue, J&T waived any objection based upon Campbell's failure to achieve service. While Campbell correctly points out that it is unnecessary to serve process on a party who has made a general appearance, *see Montano v. Scottsdale Baptist Hosp., Inc.*, 119 Ariz. 448, 452, 581 P.2d 682, 686 (1978), he has failed

to develop or support with Arizona authority his argument that stipulating to a change of venue constitutes a general appearance that obviates the need for service. *See* Ariz. R. Civ. App. P. 13(a)(6); *see also Polanco v. Indus. Comm’n*, 214 Ariz. 489, n.2, 154 P.3d 391, 393 n.2 (App. 2007).

¶6 Moreover, even were Campbell correct that J&T’s stipulation waived its right to insist on being served, we still could not say the trial court abused its discretion in dismissing the case. The court noted in its order of dismissal that “[s]ervice [was] a factor but only one of many” justifying dismissal. Fourteen months from the date Campbell filed suit, he was still unready to proceed and failed to show good cause for a further extension of time. The court found, particularly in light of its warnings, that “delays for settlement negotiations” and “issues relating to [Campbell’s] . . . inability during the three years that had passed to get the information and reports outlining the apparent basis for [J&T’s] liability” were not good cause justifying an additional extension of time. This determination was not “manifestly unreasonable,” nor made for “untenable reasons,” and therefore, not an abuse of discretion. *See Quigley*, 132 Ariz. at 37, 643 P.2d at 740.

¶7 Campbell further argues we should reverse the order of dismissal based on evidence relating to the merits of the case that was not submitted to the court below. Because the trial court correctly dismissed this case on procedural rather than substantive grounds, we need not address the merits of this claim. *See State ex. rel. Ariz. Dep’t of Rev. v. Capitol Castings, Inc.*, 193 Ariz. 89, ¶ 13, 970 P.2d 443, 446-47 (App. 1998). Furthermore, even had

the trial court reached the merits of this case, we would not consider any evidence not submitted below. *Crook v. Anderson*, 115 Ariz. 402, 403, 565 P.2d 908, 909 (App. 1977).

¶8 For the foregoing reasons, the order of dismissal is affirmed.

PHILIP G. ESPINOSA, Judge

CONCURRING:

PETER J. ECKERSTROM, Presiding Judge

GARYE L. VÁSQUEZ, Judge